UNITED STATES OF AMERICA
before the
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

IN THE MATTER OF:	
John Christo, Jr., JCJ Irrevocable Trust, BB&T Revocable Trust, and E.S.O.P., Bay Savings Bank	CASE NO. OTS AP 93-69 DATED: August 27, 1993
Majority Shareholders of Bay Savings Bank, West Palm Beach, Florida	OTS Order No. AP 95-06 DATED: January 26, 1995

DECISION AND ORDER

TABLE OF CONTENTS

I. Introduction and Summary of Conclusions 1

II. Background 2

A. Summary of the Administrative Proceedings 2

B. Summary of the ALJ's Recommended Decision 6

III. Findings of Fact 7

IV. Discussion 8

A. Standards for Motion for Summary Disposition 9

B. There is No Genuine Issue as to any Material Fact . . 9

C. Enforcement is Entitled to a Decision in its Favor as a Matter of Law 11

1. Jurisdiction 11

2. Liability 13

3. Remedy 13

V. Conclusion 16

ORDER 17

DECISION

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This case arises from four separate Net Worth Maintenance Agreements between John Christo, Jr. ("Christo"); JCJ Irrevocable Trust ("JCJ"); BB&T Revocable Trust ("BB&T"); E.S.O.P., Bay Savings Bank ("ESOP") (jointly referred to as "Respondents") (the last three Respondents jointly referred to as "Trusts"); and the former Federal Savings and Loan Insurance Corporation ("FSLIC"), operating under the direction of the former Federal Home Loan Bank Board ("FHLBB").

Christo and the Trusts, owners of approximately 85 percent of the stock of Bay Savings Bank, West Palm Beach, Florida (the "Association" or "Bay Savings"), executed Net Worth Maintenance Agreements (the "Net Worth Maintenance Agreements" or the "Agreements") in 1985 and 1986 that required Respondents to maintain the net worth of the Association for a period of five years. When the Association's capital fell below the required levels in 1989 and 1990, the Office of Thrift Supervision ("OTS") repeatedly demanded that Respondents honor the Agreements. Respondents refused to do so.

Based on the record, the Acting Director finds that Respondents' execution of the Net Worth Maintenance Agreements obligated Respondents to cure the Association's net worth

deficiency, if its net worth fell below required levels during the five year term of the Agreements; that Respondents violated the Net Worth Maintenance Agreements by failing to infuse sufficient capital into the Association when their obligation to do so under the Agreement was triggered; and that Respondents' failure to infuse capital as required under the Agreement unjustly enriched them. Accordingly, the Acting Director grants Enforcement's Motion for Summary Disposition and orders Respondent to pay $3.66 million in restitution.[1]

II. BACKGROUND

A. Summary of the Administrative Proceedings

On August 31, 1993, Enforcement instituted the instant case for a cease and desist order to direct restitution against the Respondents and for other relief.[2] The Notice of Charges alleged

---

[1] With a few exceptions, the Acting Director adopts the Administrative Law Judge's ("ALJ") findings of fact and conclusions of law.

[2] The Notice of Charges was also issued against Charles Hilton, Jr., Michael H. Nelson, and Douglas McAllister, former directors of Bay Savings. The Notice of Charges alleged that they engaged in unsafe or unsound practices in violation of the Federal Deposit Insurance Act ("FDIA") and sought an order of assessment of civil money penalties against them. The charges against these three former directors were settled with the OTS on March 14, 1994. See OTS Order No. AP 94-15 (March 14, 1994). The Notice also sought against Christo an order of prohibition pursuant to 12 U.S.C.A. § 1464(d)(4)(A) and Section 8(e) of the FDIA, 12 U.S.C.A. § 1818(e), and Civil Money Penalties. These two charges were settled on June 30, 1994. See OTS Order No. AP 94-30 (June 30, 1994). Thus, the other charges against Christo and directors

that Respondents violated the Net Worth Maintenance Agreements executed by each of them with the FSLIC by failing to maintain the net worth of Bay Savings, as required by such Agreements. It also alleged that the Respondents were unjustly enriched in connection with such violation and that such violation involved a reckless disregard for the law and applicable regulations.

In order to obtain federal deposit insurance for the Association, Respondents had executed Net Worth Maintenance Agreements with the FSLIC on September 30, 1985, and February 21, 1986, whereby Respondents agreed to infuse capital into the Association should the institution's net worth fall below the levels required by 12 C.F.R. § 563.13, or any successor regulation, for a five year period from the date of the Agreements.

According to the Notice of Charges, the FHLBB notified Respondents in January 1989, that the Association had failed to meet its regulatory capital requirement as of December 31, 1988. Respondents did not, however, infuse sufficient capital as required under the Net Worth Maintenance Agreements.[3] In August 1989 and January 1991, Respondents were again notified of the continuing deficiency and that sufficient capital had not been infused to

---

Hilton, Nelson, and McAllister were settled prior to the ALJ's Recommended Decision and Proposed Order.

[3] The Notice also stated that on May 2, 1989, in response to this notification, JCJ, with Christo serving as Trustee, contributed $100,000 in capital to Bay Savings, and at Christo's request, Charles Hilton infused $560,000 into Bay Savings.

bring Bay Savings into compliance with its minimum regulatory capital requirement.

Respondents answered, asserting six affirmative defenses. In the Answers, Respondents denied violating the Agreements executed by each of them by failing to maintain the net worth of the Association, and denied that they were unjustly enriched in connection with such violation. Among the affirmative defenses were that the Agreements were unenforceable due to lack of consideration and that the allegations were barred by the applicable statute of limitations. Respondents did not subsequently submit any filings or information regarding their answers or affirmative defenses.

A hearing was scheduled to commence on June 20, 1994. Respondents failed to provide either witness lists or exhibit lists. William H. Crawford, Esquire, submitted a document, dated March 3, 1994, to the ALJ regarding Christo which was entitled "Suggestion of Pendency of Relief Proceedings Under Chapter 7 of the Bankruptcy Code".[4] Respondents did not make any other filings in this case.

---

[4] The ALJ rejected this submission because Mr. Crawford never appeared or filed a notice of appearance as is required in the proceeding. See 12 C.F.R. § 509.6(a)(3). The ALJ also noted that a bankruptcy filing would not stay the instant administrative proceeding. See 11 U.S.C. § 362(b)(4); Board of Governors of Federal Reserve System v. MCorp Financial, Inc., 502 U.S. 32, 39 - 42 (1991).

On May 12, 1994, Enforcement filed a Motion for Summary Disposition on Cease-and-Desist/Restitution Claims under 12 U.S.C. §1818(b). The ALJ instructed Christo and John Christo, III[5] to reply, but neither they nor any of the Trusts did so. On June 2, 1994, the ALJ recommended that the Director grant the Motion for Partial Summary Disposition and certified the record to the Director. On June 10, 1994, the Acting Director returned the recommendation and certified record to the ALJ because OTS's procedural rules require that, upon determining that a party is entitled to partial summary disposition, the ALJ must defer issuing any recommended decision until a hearing has been held on the remaining claims.[6]

On June 14, 1994, the ALJ ordered a stay of the hearing sine die, resubmitted a slightly expanded order recommending that the Acting Director grant the Motion for Partial Summary Disposition, and withdrew his Recommended Decision dated June 2, 1994. On June 23, 1994, Christo entered into a settlement agreement with the OTS as to Enforcement's prohibition and civil money penalty claims, and entered into a consent order. On July 8, 1994, the ALJ issued a Recommended Decision for Summary Disposition ("Recommended Decision") and a Proposed Order on the remaining issues in the case and certified the record to the Acting Director.

---

[5] John Christo III is Christo's son and a Trustee of the Trusts.

[6] See 12 C.F.R. § 509.30.

B. Summary of the ALJ's Recommended Decision

The ALJ recommended that the Acting Director grant Enforcement's Motion for Summary Disposition and dispose of the cease and desist and restitution issues without a hearing. The ALJ determined that the Respondents had failed to make payments to the Association to maintain the Association's capital at a level that complied with the requirements of 12 C.F.R. § 563.13, or any successor regulation, and that Respondents had violated the Net Worth Maintenance Agreements which they entered into with a federal banking agency, a violation that is covered by 12 U.S.C. § 1818(b)(1).

As required by 12 C.F.R. § 509.29(a), the ALJ found that there was no genuine issue as to any material fact concerning the violation of the Net Worth Maintenance Agreements and that Enforcement was entitled to a decision in its favor as a matter of law. The ALJ concluded that the Respondents were unjustly enriched by their violations of the Net Worth Maintenance Agreements, and that their actions were in reckless disregard of the law and the applicable regulations.

Accordingly, pursuant to 12 U.S.C. § 1818(b)(6), the ALJ recommended the entry of an Order to Cease and Desist and Make Restitution imposing joint and several liability on the Respondents for payment of restitution to the Resolution Trust Corporation

("RTC"), receiver of the Association, in the amount of $3.66 million.

Neither party entered exceptions to the ALJ's Recommended Decision. On September 30, 1994, the parties were notified that the ALJ's Recommended Decision dated July 8, 1994, had been submitted to the Acting Director for final decision.

III. FINDINGS OF FACT

The Acting Director generally accepts the facts relied on by the ALJ in his Recommended Decision.[7] The ALJ's Findings of Fact are supported by documentary evidence submitted with Enforcement's Motion for Summary Disposition, including the Affidavits of Arthur W. Goodhand, a FHLBB Supervisory Agent, and David J. Maher, an OTS examiner, and admissions in the Answers filed by Respondents.[8]

---

[7] The Acting Director notes, however, that a typographical error on page 12 of the Recommended Decision refers to February 12, 1985, instead of February 22, 1985, as the date the FHLBB conditionally granted insurance of accounts in FHLBB Resolution No. 85-137.

[8] Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate. See 12 C.F.R. § 509.29(b)(2). Respondents did not file any response to Enforcement's Motion for Summary Disposition, although they were requested to do so by the ALJ in a letter to Respondents on May 12, 1994.

IV. DISCUSSION

For the reasons summarized below, the Acting Director concludes that Respondents' liability for their failure to infuse capital, pursuant to the requirements of the Net Worth Maintenance Agreements, into Bay Savings is undisputed on the record and that the standards for summary disposition have been satisfied. The Acting Director also is persuaded that the record evidence shows unjust enrichment and that restitution accordingly is an appropriate remedy.[9]

---

[9] Although the ALJ did not rule specifically on Respondents' six affirmative defenses, the Acting Director determines that they are without merit: (1) the complaint did state a cause of action upon which relief can be granted, see 12 U.S.C. 1818(b); (2) Respondents did not submit any information or evidence in support of their defense that they acted at all times pertinent to the complaint in a manner consistent with reasonable, informed business judgment; (3) FSLIC was not required to sign the Agreements in order to make them enforceable, see Kaneb Services v. FSLIC, 650 F.2d 78, 82 (5th Cir. 1981); In re Rapaport, No. 90-49, Recommended Decision at 71 (April 13, 1993), aff'd, OTS Order No. AP 93-95 (November 18, 1993), appeal pending, No. 93-1811 (D.C. Cir.); (4) consideration, or lack thereof, is not a defense to recovery under a Net Worth Maintenance Agreement, see Akin v. OTS, 950 F.2d 1180, 1183 (5th Cir. 1992); (5) the statute of limitations had not expired, see Simpson v. OTS, 29 F.3d 1418, 1425 (9th Cir. 1994), petition for cert. filed, 63 U.S.L.W. 3462 (U.S. Nov. 23, 1994) (No. 94-953); and (6) Respondents' sixth affirmative defense incorporated by reference Hilton's, Nelson's and McCallister's affirmative defenses, which were redundant of the other defenses or inapplicable to the pending claim against Respondents.

A. Standards for Motion for Summary Disposition

The Director may grant a motion for summary disposition where: (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to a decision in its favor as a matter of law. 12 C.F.R. § 509.29(a). Both conditions are satisfied here. The facts are uncontested,[10] and are fully supported in the record. In light of the uncontested facts -- Respondents' obligation and failure to contribute sufficient capital -- Enforcement is entitled to a decision in its favor as a matter of law.

B. There is No Genuine Issue as to any Material Fact

The material facts are that Christo was a principal organizer, major stockholder, and the Chairman of the Board of Bay Savings, a de novo institution. (ALJ's Findings of Fact Nos. 5 and 8). The Trusts[11] were stockholders in Bay Savings, and together with Christo, were the controlling stockholders. (ALJ's Finding of Fact No. 6). Respondents had control of 85 percent of the outstanding voting stock in Bay Savings, and were required to enter into Net

---

[10] Respondents never contested Enforcement's Motion for Summary Disposition, nor did they file any exceptions to the ALJ's Recommended Decision. Indeed, they have never offered any facts to challenge Enforcement's evidence or the ALJ's conclusions.

[11] Christo's son, John Christo III, was a trustee of each Trust, and as trustee he executed the Trusts' three Net Worth Maintenance Agreements.

Worth Maintenance Agreements with the FSLIC as a condition of obtaining deposit insurance. (ALJ's Findings of Fact Nos. 7 and 10).

The Agreements required the signatories to make payments to the Association in order to maintain the Association's net worth. (ALJ's Finding of Fact No. 13). The Agreements also required that if the "Acquiror owns 80 percent or more of the total stock of the Association, the Acquiror shall infuse into the Association additional capital in a form satisfactory to the Supervisory Agent, in an amount equal to 100 percent of the Association's total Net Worth Deficiency." (ALJ's Finding of Fact No. 13).

In January 1989, Bay Savings reported that its capital was $660,000 less than required by federal regulations. (ALJ's Finding of Fact No. 14). On January 31, 1989, the FHLBB sent Christo a notice of default based on the $660,000 deficiency. (ALJ's Finding of Fact No. 15). The only stockholder to respond was JCJ which, in May 1989, made a capital contribution to Bay Savings in the amount of $100,000. (ALJ's Finding of Fact No. 16). Respondents made no other payments to the Association pursuant to the Net Worth Maintenance Agreements. (ALJ's Finding of Fact No. 19). In July 1989, Bay Savings reported that its capital was $276,000 below its minimum capital requirement. (ALJ's Finding of Fact No. 17). Written notices of Default were sent by the OTS to Christo on August 16, 1989, and January 23, 1991. (ALJ's Finding of Fact Nos.

18 and 22). No capital contributions followed. (ALJ's Finding of Fact No. 23).

In or about August 1991, the Association reported to the OTS that its capital was $3.66 million below its risk-based capital requirement. (ALJ's Finding of Fact No. 25). On September 6, 1991, the RTC was appointed as receiver for the Association. (ALJ's Finding of Fact No. 26).[12]

The Acting Director concludes that the ALJ's Findings of Fact are fully supported in the record and, consequently, determines that there is no genuine issue as to any material fact.

C. Enforcement is Entitled to a Decision in Its Favor As a Matter of Law

1. Jurisdiction

It is undisputed that Respondents are "institution-affiliated-parties" under 12 U.S.C. § 1813(u). The term "institution-affiliated-party" includes a controlling shareholder of an insured depository institution. See 12 U.S.C. § 1813(u)(1). Respondents admitted in their respective Answers that at all times relevant,

---

[12] The ALJ found that the lack of capital infusion by the Respondents led to the demise of the Association. (ALJ's Recommended Decision at p. 24).

Christo and the Trusts were the controlling shareholders of Bay Savings.

The ALJ also concluded that, apart from Respondents' admission, Christo and the three Trusts acted in concert, thus becoming controlling shareholders under 12 C.F.R. § 571.6(d)(4)(iv)(b). The ALJ based that conclusion on the intra-family presumption of acting in concert. See 12 C.F.R.§ 574.4(d)(2). The Acting Director does not disagree with this conclusion, but also determines that another presumption should be applied here as well, the presumption that persons and trusts for whom they are trustees should be deemed to be acting in concert. See 12 C.F.R. § 574.4(d)(6).[13] John Christo III, who is deemed to act in concert with his father, John Christo Jr., was trustee of all of the Respondent Trusts. Thus, all five entities, Christo Jr. and his son and the three trusts, should be deemed to act in concert. See 12 C.F.R. § 574.4(d)(2), (4), (6), (7).

---

[13] At the time all Respondents entered into Net Worth Maintenance Agreements, the presumption included tax-qualified employee stock ownership plans. 12 C.F.R. §§ 574.4(a)(2)(vii) and 574.4(d)(6) (1986). Subsequently, tax-qualified employee stock ownership plans were excluded from this provision. 12 C.F.R. §§ 574.2(c)(3) and 574.4(d)(6) (1987). In this case, since all of the Respondents, including the ESOP, admitted that they were acting in concert and did not invoke the exception for employee stock ownership plans, the Acting Director sees no reason to exclude the ESOP here.

2. Liability

As a condition to the insurance of Bay Savings' accounts and the issuance of a new charter, the Respondents assumed a commitment to maintain Bay Savings' net worth for a period of five years from the dates of the Net Worth Maintenance Agreements. Each Net Worth Maintenance Agreement executed by each Respondent was a "written agreement" under 12 U.S.C. §§ 1730(e) (repealed) and 1818(b). Respondents failed, the uncontested facts show, to contribute sufficient capital to Bay Savings when their Agreements so required. Thus, as a matter of law, Respondents have "violated . . . [a] written agreement entered into with the agency." 12 U.S.C. § 1818(b)(1). Respondents, accordingly, are liable under section 1818(b) for such remedies as OTS may have authority to impose. See In re Akin, OTS Order No. 90-4009 (December 24, 1990), aff'd sub nom., Akin v. OTS, 950 F.2d 1180 (5th Cir. 1992); In re Rapaport, OTS Order No. AP 93-95 (November 18, 1993).

3. Remedy

According to 12 U.S.C. § 1818(b)(6)(A), the OTS is authorized to require any institution-affiliated party to take affirmative action, including requiring such party to "make restitution or provide reimbursement, indemnification, or guarantee against loss if - (i) such . . . party was unjustly enriched in connection with such violation or practice; or (ii) the violation or practice

involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency . . . ". This agency has made clear that an institution-affiliated-party that executes a net worth maintenance agreement for purposes of obtaining a benefit from the government -- such as deposit insurance or forbearance from enforcement action -- and that later fails to comply with the obligation in the agreement to contribute capital is "unjustly enriched" if the party had resources that could have been used to make the required capital contributions. See In re Akin, OTS Order No. 90-4009 at 27, aff'd sub nom., Akin v. OTS, 950 F.2d at 1184; In re Rapaport, OTS Order No. AP 93-95 at 38-39. Put another way, an institution-affiliated party that retains assets that could have been invested in the thrift in order to comply with the net worth maintenance obligation has been unjustly enriched.

In this case, the Respondents entered voluntarily into the Agreements in order to obtain insurance of accounts for the Association. Continuing capital deficiencies at Bay Savings triggered Respondents' obligation to contribute capital -- and the FHLBB and OTS provided Respondents formal notice of this fact -- yet Respondents failed to fulfill that obligation. The record shows that Respondents had sufficient resources available to them at the time to make the required contributions. The Acting Director accordingly determines that Respondents retained for their own benefit assets that should have been invested in Bay Savings

and agrees with the ALJ's conclusion that the Respondents were unjustly enriched for purposes of 12 U.S.C. § 1818(b)(6)(A).[14]

As to the amount of restitution owed, the Net Worth Agreements specifically state that if the "Acquiror owns 80 percent or more of the total stock of the Association, the Acquiror shall infuse into the Association additional capital . . . in an amount equal to 100 percent of the Association's total Net Worth Deficiency." Because Respondents are deemed to have acted in concert regarding ownership of Bay Savings, see pp. 11 - 12 & n. 13, supra, their ownership amounts may be aggregated. Respondents together owned over 80 percent of the outstanding voting stock in Bay Savings. Thus, Respondents are responsible for the infusion of 100 percent of the Association's capital deficiency.

The Acting Director agrees with the ALJ's finding that the moving party is entitled to a decision in its favor as a matter of law, and, consequently, that the second standard for summary disposition has been met by Enforcement under 12 C.F.R. § 509.29(a).

---

[14] Because unjust enrichment is a sufficient ground for ordering restitution in this proceeding, the Acting Director does not address whether Respondents acted in reckless disregard of the law and does not adopt the ALJ's conclusion on this point.

V. CONCLUSION

Based on the record, the Acting Director concludes that the requirements of 12 C.F.R. § 509.29 for Summary Disposition have been satisfied and, consequently, that Enforcement is entitled to a decision in its favor on the Motion for Summary Disposition. The Acting Director also finds that the Respondents' execution of the Net Worth Maintenance Agreements rendered Respondents personally liable (and jointly and severally liable) for 100 percent of the Association's net worth, if its net worth fell below required levels during the five year term of the Agreements; that Respondents violated the Net Worth Maintenance Agreements by failing to infuse sufficient capital into the Association when their obligation to do so under the Agreements was triggered; and that Respondents' failure to infuse sufficient capital as required under the Agreements unjustly enriched them. Accordingly, the Acting Director affirms the conclusions of the Administrative Law Judge with respect to Respondents' liability (other than the determination of reckless disregard) and orders Respondents, jointly and severally, to pay $3.66 million to the Association in receivership.

O R D E R

Upon consideration of the entire record in this matter, including the Recommended Decision filed by the Administrative Law Judge, the submissions of the parties, and for the reasons set forth in the accompanying Decision, the Director of the OTS, pursuant to his authority under 12 U.S.C. § 1818(b), finds that:

Respondents John Christo, Jr., JCJ Irrevocable Trust, BB&T Revocable Trust, E.S.O.P., Bay Savings Bank ("Respondents") have violated the Net Worth Maintenance Agreements they executed in connection with the FHLBB's grant of federal deposit insurance to Bay Savings Bank, West Palm Beach, Florida ("Bay Savings"); and Respondents were unjustly enriched by their violation of the Net Worth Maintenance Agreements.

IT IS HEREBY ORDERED THAT:

1. Respondents shall cease and desist from violating the Net Worth Maintenance Agreements;

2. On the effective date of this Order, Respondents shall contribute capital, in the amount of $3.66 million, representing their liability under the Net Worth Maintenance Agreements, into Bay Savings, in a form acceptable to the Resolution Trust Corporation ("RTC") as receiver;

3. The form of any capital that Respondents contribute to Bay Savings under this Order must be approved by the RTC. If, for any reason, the RTC does not approve the form of capital contribution by Respondents, such disapproval shall not relieve Respondents of their obligation to infuse capital into Bay Savings pursuant to this Order; and

4. The provisions of this Order are effective upon the expiration of thirty (30) days after service of this Decision and Order on Respondents, and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order shall be stayed, modified, terminated, or set aside by the Director or reviewing court. Respondents are hereby notified that they have the right to appeal this Decision and Order to the appropriate United States Court of Appeals within 30 days after service of such Decision and Order. 12 U.S.C. § 1818(h).

OFFICE OF THRIFT SUPERVISION

Date: January 24, 1995

Jonathan L. Fiechter
Acting Director